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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 372

JOSEPH TRINER CORPORATION, A CORPORATION,
(Plaintiff) Appellee,

vs.

CARL W. McNEIL, DOING BUSINESS AS McNEIL'S LIQUOR STORE,
(Defendant) Appellant.

APPEAL FROM THE SUPREME COURT OF ILLINOIS (NO. 23475); THERE HEARD ON APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

Honorable BENJAMIN P. EPSTEIN, Judge Presiding.

Statement of Jurisdictional Facts.

Pursuant to Rule 12, Paragraph 1, of the Rules of the Supreme Court of the United States, Carl W. McNeil, doing business as McNeil's Liquor Store, appellant in the above entitled cause, presents the following statement particularly disclosing the basis upon which appellant contends

that the Supreme Court of the United States has jurisdiction upon appeal to review the decree of the Supreme Court of the State of Illinois appealed from herein:

(a) The Statutory Provisions Believed to Sustain the Jurisdiction.

Section 237 (a) of the Judicial Code of the United States (28 U. S. C. A., Section 344) provides:

> "(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State on the ground of it being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such State court and may in its discretion, award execution or remand the cause to the court from which it was removed by writ."

Sections 861 (a) and 861 (b) of the U. S. C., Title 28, provide as follows:

> "861 (a) The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.
>
> 861 (b) The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief including the provisions relating to costs, supersedeas and mandate, shall be applicable to the appeal which Section 861 (a) of this title substitutes for a writ of error."

(b) The Statute of the State of Illinois, the Validity of Which is Involved.

The statute of the State of Illinois, the validity of which is involved, is known and cited as the "Fair Trade Act", may be found in Smith-Hurd Revised Statutes, 1935, Chapter 121½, Section 188, *et seq.*, and in Illinois State Bar Statutes, 1935, Chapter 140, Section 8, *et seq.*, and is in words and figures as follows, to wit:

"An Act to Protect Trade Mark Owners, Distributors and the Public Against Injurious and Uneconomic Practices in the Distribution of Articles of Standard Quality Under a Trade Mark, Brand or Name.

Be it Enacted by the People of the State of Illinois Represented in the General Assembly:

SECTION 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity; provided, however, that such stock is first offered to the manufacturer of such stock at the original invoice stock price; at least ten (10) days before such stock shall be offered for sale to the public.

(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(3) By any officer acting under the orders of any court.

SECTION 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

SECTION 3. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

SECTION 4. This Act may be known and cited as the "Fair Trade Act."

(c) The Date of Decree Sought to be Reviewed.

By its opinion delivered on the 10th day of June, 1936, the Supreme Court of Illinois affirmed the decree of the Circuit Court of Cook County, Illinois. Appellant filed no petition for rehearing within the time allowed by the rules of the Supreme Court of Illinois and therefore the decree became final on said 10th day of June, 1936. Application for appeal is presented herewith by the petition for leave to appeal this 26th day of August, 1936, within three months after the said 10th day of June, 1936, when said decree became final.

(d) Nature of Case, Rulings of the Court and Cases Believed to Sustain Jurisdiction.

The appellee filed its complaint herein on November 8, 1935, seeking an injunction against the appellant to restrain him from wilfully advertising for sale, offering to sell or selling whiskey below a uniform price established by the appellee in contracts with various third parties other than the appellant, pursuant to the Illinois Fair Trade Act hereinbefore quoted in full. Upon the application of the appellee an order was entered on November 16, 1935, directing the issuance of a temporary injunction. Thereafter the appellant filed his written motion to dissolve the temporary injunction and to dismiss the complaint for want of equity on the ground that it was substantially insufficient in law. The motion to dismiss specifically raised the point that the Fair Trade Act violated the Federal Constitution.

The complaint alleges in substance: The plaintiff is a corporation engaged in business in the City of Chicago, Illinois, as a wholesale distributor selling to retailers for resale in that city various brands of liquors and alcoholic beverages of standard quality. The defendant is a retailer, engaged in said City in selling various brands of liquor and alcoholic beverages at retail (Abst. 1-2). The plaintiff sells at wholesale to retailers of said City certain liquors and alcoholic beverages commonly known as "Schenley Products" which it purchases from a New York corporation, Schenley Distributors, Inc., which is licensed to do business in the State of Illinois, and is the sole sales and distributing agent of certain affiliated liquor distilleries known as the Schenley Distilleries. The plaintiff is one of ten wholesalers of Schenley products in the City of Chicago who are known as "local Schenley distributors" (Abst. 2). These local Schenley distributors are limited to that

number and are the only ones selling Schenley Products at wholesale in the City of Chicago.

The plaintiff has a considerable financial investment in its business. An important and valuable asset of said business is the good will of the retailers who purchase Schenley products from the plaintiff, and of the public and consumers who purchase said products in Chicago. The good will has been built up in part by the maintenance by local Schenley distributors and Schenley Distributors, Inc., of a uniform retail price for their products (Abst. 3-4). Schenley products consist of various brands of straight whiskeys, blended whiskeys, bonded whiskeys, gins, brandies, cordials, and rums. All of said brands at all times have been and are of standard quality or make. All of said brands are sold in bottles which have affixed thereon a paper label bearing the trade-mark, duly registered with the United States Patent Office, of the producer of the product and the brand and name of the producer (Abst. 4-5). One of said brands is known as "Old Quaker". Said brand of "Old Quaker" is in fair and open competition with commodities of the same general class sold at retail in said City, produced by persons other than said Schenley Distilleries (Abst. 5-6).

The complaint alleges in some detail the peculiar characteristics of the market in liquor and alcoholic beverages and sets forth the beneficial effects of the maintenance of uniform prices of liquors and the evil effects of price cutting (Abst. 6-9). In view of the position taken by the defendant that the statute under which this action is brought is invalid, we consider it purposeless to go more fully into this portion of the complaint.

Schenley Distributors, Inc., adheres to a business policy of securing to consumers a uniform and standard retail price fixed at an amount fair and reasonable to manufacturer, distributor and consumer for each brand of

Schenley products sold in Chicago. The uniform and standard retail price for the brand known as "Old Quaker" is $1.89 per quart, 98¢ per pint and 50¢ per one-half pint. Schenley Distributors, Inc., in accordance with said business policy, suggests to the plaintiff and other local Schenley distributors a minimum retail price for which each of its brands should be sold at retail. In the event any distributor sells any brand of Schenley products to any retailer who is known by said distributor to sell any brand of Schenley products in Chicago at less than the uniform retail price suggested, Schenley Distributors, Inc., refuses to sell said products to said distributor (Abst. 11-12).

After the enactment of the Fair Trade Act (which is alleged in the complaint in *haec verba*) (Abst. 9-10), the plaintiff, to avail itself of the benefits of the act, entered into various contracts with retailers, which contracts contain a provision that said retailers would not resell said brands except at the prevailing uniform and standard Schenley retail price. During the five months preceding the institution of suit, all sales of Schenley Products made by plaintiff to retailers were made under such contracts.. Defendant knew of these contracts at the time that he engaged in the conduct hereinafter described. The other local Schenley distributors similarly entered into like contracts with their retailers, and the number of all retailers in Chicago selling under such contracts approximated 85% of all retailers selling Schenley products in that city. As a result of the foregoing business policy certain beneficial consequences are alleged to have ensued (Abst. 12-15). We do not consider it material to describe these at length.

During the month of October, 1935, the defendant, Carl W. McNeil, threatened to sell, offer for sale and advertise for sale, the brand of whiskey known as "Old Quaker" at a price lower than the stipulated uniform standard Schenley retail price. At the time of making such threats the

defendant knew of the existing contracts to maintain the price of said brand. On October 16, 1935, the plaintiff informed the defendant of the business policy of the plaintiff and of its attempts to avail itself of the benefits of the Fair Trade Act by entering into said agreements, and requested the defendant not to sell, offer for sale or advertise for sale at retail in Chicago said brand of "Old Quaker" below the uniform price. The plaintiff tendered to the defendant a form of printed agreement which it used in making sales of Schenley products to other retailers. Said form of printed agreement is attached to the complaint as an exhibit (Abst. 24-25). The defendant refused to enter into such an agreement (Abst. 15-17).

On October 18, 1935, the defendant sold large quantities of the brand of "Old Quaker" at 77¢ per pint (the uniform price whereof was then 98¢ per pint) said defendant knowing at the time of the various contracts stipulating the uniform retail price. Thereafter the defendant was requested by plaintiff to cease underselling the uniform price, but the defendant asserted that he would not refrain from so doing (Abst. 17-18). As a result of the defendant's conduct a great number of other retailers located in the vicinity of the defendant's store threatened to violate their contracts with the plaintiff and to sell and offer for sale said brand of "Old Quaker" at the price of 77¢ or less per pint in order to meet competition. Several of the retailers did violate their contracts. The sales by said retailers at said price of 77¢ and below, it is alleged, did not yield said retailers a fair and reasonable profit and some of the retailers began to and did offer to the public substitute brands for "Old Quaker" when the public called for that brand. The plaintiff consequently suffered great loss and irreparable injury (Abst. 18).

On November 8, 1935, the defendant again offered to sell, advertised for sale and sold "Old Quaker" at 77¢ per

pint. On that day the defendant displayed in the front window of his store bottles bearing the trade name and trade mark of "Old Quaker" and attached to the pane of said window, signs advertising said brand at 77¢ per pint. The uniform price was then 98¢ per pint, and defendant knew that (Abst. 19).

All of the quantity of "Old Quaker" sold by defendant was purchased by the defendant from various persons within the State of Illinois who kept and had said quantity in stock in said State prior to selling same to said defendant. Said quantity so purchased by the defendant was purchased subsequent to the time when said Fair Trade agreements were entered into by the plaintiff and subsequent to the time that said defendant knew of the standard and uniform price for said brand fixed in said agreements. Said whiskey was not dealt in by defendant for the purpose of or in the course of closing out said quantity of said brand for the purpose of discontinuing delivery of said brand nor because said quantity nor any part thereof was damaged or deteriorated nor on account of or pursuant to an order of court (Abst. 20).

The complaint alleges that unless the defendant is restrained from selling below the uniform price great and irreparable injury to the plaintiff will result. The injury is specifically set forth. The amount of compensation which would afford relief to the plaintiff is alleged to be difficult of ascertainment. An injunction against the defendant is accordingly prayed (Abst. 21-22).

The motion of the appellant for a decree dismissing the complaint for want of equity on the ground that the complaint is substantially insufficient in law raises the sole objection that the Fair Trade Act is unconstitutional (Abst. 29). The following specific Federal constitutional objections were raised: (a) it violates the due process clause of the Fourteenth Amendment to the Federal Constitution in

that its provisions, terms and language are so incomplete, vague, indefinite and uncertain that the Act does not express clearly or intelligibly the subject matter attempted to be covered and the acts permitted, required or forbidden to be done thereunder, and provides for arbitrary classification of persons (Abst. 30); (b) it violates the Fourteenth Amendment to the Federal Constitution by denying to the defendant the equal protection of the laws.

The trial court held the statute constitutional and overruled the motion for a decree dismissing the complaint for want of equity. The appellant elected to abide by his motion and accordingly a final decree was entered granting a permanent injunction as prayed for in the complaint. Since the validity of a statute was involved an appeal was taken directly to the Supreme Court of Illinois. The Supreme Court of Illinois affirmed the decree of the trial court and refused to sustain the various points urged by appellant challenging the constitutionality of the Fair Trade Act. As appears from the opinion of the Supreme Court of Illinois (363 Ill. 559) the constitutional questions were specifically and directly considered and passed upon by the court. Thus on page 567 the court said:

> "The contention is made that the Fair Trade Act violates the equal protection of the laws provision of the Fourteenth Amendment to the Federal Constitution, the due process clauses of the Federal and State Constitutions, and also Section 12 of Article IV of the State Constitution."

Again on page 569 the court said:

> "The defendant maintains that Section 2 of the Fair Trade Act arbitrarlly deprives him of his right to determine the price at which he will sell his commodities and in consequence violates the due process clauses of the Federal and State Constitutions."

Also on page 575 the court said:

> "The defendant argues, however, that the Fair Trade Act creates an arbitrary classification of persons and grants to such persons special privileges and immunities in contravention of the constitutional guaranties invoked."

By its decision the Supreme Court of Illinois overruled all of the foregoing objections raised by appellant and sustained the validity of the Fair Trade Act.

The following are a few of the many cases in which the Supreme Court of the United States has recognized its jurisdiction to review decisions of the courts of last resort of the several States, which decisions of the State courts sustain the validity of State statutes against attack on the grounds that they violated the Constitution of the United States:

Tyson v. *Banton,* 273 U. S. 418 (which involved a statute fixing the price of theatre tickets) and cases therein cited;

Fairmont Co. v. *Minnesota,* 274 U. S. 1 (which involved a statute controlling the price of dairy products) and cases therein cited;

Wolff Co. v. *Industrial Board,* 262 U. S. 522 (which involved the regulation and fixing of wages);

Williams v. *Standard Oil Co.,* 278 U. S. 235 (which involved a statute fixing the price of gasoline) and cases therein cited;

Ribnik v. *McBride,* 277 U. S. 350 (which involved a statute regulating the fees of employment agencies) and cases therein cited;

Nebbia v. *New York,* 291 U. S. 502 (which involved a statute fixing the price of milk).

The effect of the Illinois Fair Trade Act is to permit the fixing of resale prices of commodities bearing a trade-mark, brand or name by the owners, vendors and vendees thereof.

No restraints whatsoever are placed upon the action of these private persons in fixing resale prices. *They have the power, without the consent of the appellant and in the teeth of his expressed protest, to exact such resale prices as they in their unlimited discretion may determine.* Substantial charges of unreasonable, discriminatory and unjust classification of persons are levelled at the statute in question; charges of ambiguity, uncertainty and indefiniteness in the terms of the statute are raised, and most important of all, the charge is made that the appellant and his property by virtue of the Fair Trade Act are bound and controlled by the actions of others, however arbitrary and unreasonable, without his consent and without opportunity to be heard at any time before any judicial or legislative tribunal. It is manifest that these charges are serious and require consideration by this Court to determine whether or not a statute containing such drastic grant of powers and phrased as this statute is phrased has properly been declared free from repugnancy to the Constitution of the United States. That these charges are earnestly made and raise serious questions of validity of the statute is apparent from the extended and deliberate consideration accorded these charges by the Supreme Court of Illinois. No stronger evidence of the substantial and serious nature of the questions involved is needed than the opinion of the Court itself (363 Ill. 559).

The final decree entered herein is a judgment in the highest court of Illinois in which a decision in the suit can be had and there is drawn in question in said suit the validity of a statute of the State of Illinois on the ground of its being repugnant to the Constitution of the United States. The decision of the Supreme Court of the State of Illinois was in favor of its validity and therefore under the Judicial Code of the United States in effect prior to January 31, 1928, the appellant would have been entitled to have said

judgment reviewed by the Supreme Court of the United States on writ of error. Under the Act of January 31, 1928 as amended April 26, 1928 (28 U. S. C. A. Sections 861 (a) and 861 (b)) the present appeal is a substitute for the review by writ of error existing as a matter of right prior to January 31, 1928.

For all of the foregoing reasons it is respectfully submitted that a substantial Federal constitutional question is presented for decision in this cause and an appeal lies as a matter of right from the decree of the Supreme Court of the State of Illinois to the Supreme Court of the United States.

NICHOLAS J. PRITZKER,
J. HERZL SEGAL,
STANFORD CLINTON,
Attorneys for Appellant.

Dated August 26, 1936.

EXHIBIT "A".

Docket 23475. Agenda 27.

APRIL TERM, 1936.

JOSEPH TRINER CORPORATION, *a Corporation, Appellee,*

vs.

CARL W. MCNEIL, *Doing Business as McNeil's Liquor Store, Appellant.*

Appeal from the Circuit Court of Cook County.

Mr. Justice WILSON delivered the opinion of the court:

This is a proceeding instituted by the plaintiff seeking relief under the provisions of the Fair Trade act approved July 8, 1935. (Ill. State Bar Stat. 1935, p. 3091; Smith's Stat. 1935, p. 2893.) The title of the statute expresses its purpose as "An act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade mark, brand or name." Section 1 provides: "Sec. 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

"(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

"(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

"Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

"(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity; provided, however, that such stock is first offered to the manufacturer of such stock at the original invoice price, at least ten (10) days before such stock shall be offered for sale to the public.

"(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

"(3) By any officer acting under the orders of any court."

There appears to be no serious contention that the act, up to this point, is invalid and unenforcible. We are particularly concerned with section 2 which declares that "wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

The third section provides that the act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices. The Fair Trade act thus permits vertical resale price maintenance but condemns, as to the Federal and State Anti-trust laws, horizontal arrangements for fixing prices. The act prescribes no criminal penalties.

The facts upon which this action is predicated are not in dispute. Schenley Distributors, Inc., licensed to transact business in Illinois, is the sole sales agent and representative in this State for certain liquors and alcoholic beverages manufactured by several affiliated distilleries known as the Schenley distilleries. "Old Quaker" is the brand name of one of the Schenley products and the name has been duly registered as a trademark with the United States patent office. Affixed to each bottle of "Old Quaker" is a distinc-

notice thereof, so as to make resale price maintenance contracts binding as against third persons with notice. The rule was applied in *DeMattos* v. *Gibson,* 4 DeG. & J., 276 (1858), 45 Eng. Rep. 108, in granting specific performance to the charterer against the ship owner and a mortgagee who had taken the mortgage with notice of the charter party. This decision was followed by the Privy Council in *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.* (1926), A. C. 108, and the principle of *Tulk* v. *Moxhay* was again applied in an action to enforce a charter party against a subsequent purchaser of a ship. The Illinois Supreme Court has uniformly followed the rule of *Tulk* v. *Moxhay* and has enforced restrictions on the use of land as against purchasers with notice in accordance with the rule of that case. *Frye* v. *Partridge,* 82 Ill. 267, 270 (1878), *Wiegman* v. *Kusel,* 270 Ill. 520, 522, 110 N. E. 884 (1915); *Brandenburg* v. *Country Club Building Corp.,* 332 Ill. 136, 145, 163 N. E. 440 (1928); *O'Neill* v. *Wolf,* 338 Ill. 508, 515, 170 N. E. 669 (1930).

This court has in an analogous situation recognized the enforcibility of an equitable lien on personal property as against third persons with notice, as in *Walker* v. *Brown,* 165 U. S. 654 (1897), followed in *Aldrich* v. *Ederer Co.,* 302 Ill. 391, 395, 134 N. E. 726 (1922).

If it be insisted that there must be a dominant tenement in order that an equitable servitude be created, the business of plaintiff clearly satisfies such requirement. (See 36 Harvard Law Review, 107, 1922.)

In view of the foregoing precedents, a court, even in the absence of legislation such as Section 2 of the

Illinois Fair Trade Act, might hold that Fair Trade contracts valid under Section 1 of the Act are binding in equity as against third persons acquiring the goods in question with notice of such contracts. As stated in Chafee, *Equitable Servitudes on Chattels,* 41 Harvard Law Review, 945, 987. (1928) "the doctrine of equitable servitudes is a legitimate tool in the judicial equipment ready for use when desirable." The legislature has determined the desirability of utilizing this doctrine so far as resale price maintenance contracts are concerned, and it is clear under the authorities that in so doing the legislature has not violated any constitutional rights of defendant. Surely defendant cannot contend that he is deprived of property without due process of law where, as in this case, the property is acquired by defendant with notice of the restrictions to which it has necessarily been subjected. As stated by Lurton, J., in *Jones* v. *Great Southern Fireproof Hotel Co.*, 86 Fed. 370, 388 (C. C. A. 6th, 1898), in upholding a statute providing for mechanics' liens in favor of subcontractors:

> "Neither can the owner be said to be thereby deprived of his property without due process of law. He has voluntarily made a contract with the law before him. He has thereby subjected his property to liability for certain debts of the contractor. His own voluntary consent is an element in the transaction. He knows what the law is and makes a contract under that law. It is idle to say that under such circumstances he is deprived of his property without due process of law. *Provident Inst. for Savings* v. *Jersey City,* 113 U. S. 506, 514 (1885) * * *."

This opinion was adopted by this Court in *Great Southern Fireproof Hotel Co.* v. *Jones,* 193 U. S. 532, 550 (1904). See also: *Sperry & Hutchinson Co.*

v. *Rhodes,* 220 U. S. 502 (1911), upholding a New York statute prohibiting the use of a person's picture for advertising purposes without his written consent.

Since it is apparent that the legal title which defendant asserts in Seagram products is necessarily subject to the restrictions contained in the admittedly valid distributor's contracts, the defendant cannot maintain that it is deprived of property without due process of law. (See *Bitterman* v. *L. & N. R. R. Co.* 207 U. S. 205, 222 (1907), 13 New York University L. Q. Rev. 267, 272, 275 (1936). In this connection, it should be noted that the Fair Trade Act in requiring actual notice is less onerous than recording acts to which third persons are bound, irrespective of actual notice, and as to which there can be no question of constitutionality.

4. The Act is a proper exercise of the police power of the State.

(a) The control of the economic evil of price-cutting is a proper subject for state legislation.

Defendant's contention that it has the inherent right to sell Seagram products free of restrictions, irrespective of the restrictions imposed thereon pursuant to the Fair Trade Act, because it claims to have had such absolute right before its enactment, ignores the fact that the defendant cannot claim a vested right in the common law or public policy which may have existed prior to the enactment of the statute. *Second Employers' Liability Cases,* 223 U. S. 1, 50 (1911); *New York Central Railroad Co.* v. *White,* 243 U. S. 188, 198 (1917); *Arizona Employers' Liability Cases,* 250 U. S. 400, 420 (1919). There

are innumerable instances where this court has held that legislation imposing new obligations and responsibilities does not violate the due process clause of the Fourteenth Amendment. *Pizitz Dry Goods Co.* v. *Yeldell,* 274 U. S. 112, 115 (1927); *Chicago* v. *Sturges,* 222 U. S. 313 (1911); *Noble State Bank* v. *Haskell,* 219 U. S. 104, 113 (1911); *Chicago & Alton Railroad Co.* v. *Tranbarger,* 238 U. S. 67, 76 (1915); *Sperry & Hutchinson Co.* v. *Rhodes,* 220 U. S. 502 (1911); *Arizona Employers' Liability Cases,* 250 U. S. 400 (1919); *New York Central Railroad Co.* v. *White,* 243 U. S. 188 (1917). It is also beyond question that the enactment of statutes for the protection of the owners of trade-marks, brands and names is a proper subject of state legislation. *American Trading Co.* v. *Heacock,* 285 U. S. 247, 258 (1932); *United Drug Company* v. *Rectanus Company,* 248 U. S. 90, 98 (1918); *Trade-Mark Cases,* 100 U. S. 82, 93 (1879).

The Fair Trade Act prevents the defendant from asserting an absolute right to sell Seagram products under the Seagram name in a manner which the legislature has declared to be uneconomic and injurious to the public, to the plaintiff and to others interested in the distribution of said products. In its exercise of the police power, the Illinois legislature has provided for resale price maintenance as means of curbing the economic evil of price-cutting because, in its judgment, such protection of the public and property rights in names, brands and trade-marks was "held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." *Noble State Bank* v. *Haskell,* 219 U. S. 104, 113 (1911). This Court has repeatedly held that there is no absolute freedom to do as one wills or to contract as one chooses; that

liberty of contract is a qualified and not an absolute right; and that liberty implies the absence of arbitrary restraint and not an immunity from reasonable regulations and prohibitions imposed in the interests of the community.

The numerous decisions of this court sustaining the validity of statutes involving the exercise of the police power have often been mentioned.* The restraint or interference which the defendant asserts it was subjected to by the Fair Trade Act is much less drastic than the curtailment of liberty of contract and property, held valid by this Court in the cases referred to, and the principles applied in such cases support the validity of the Fair Trade Act as a proper exercise of the police power.

Defendant's claim that the Fair Trade Act is invalid because it benefits producers and distributors of branded articles, presents no valid constitutional objection to the Statute. The fact that the claimed infringement of the defendant's rights may benefit a particular class of persons will not invalidate the statute if in the judgment of the legislature it is considered necessary to promote the general welfare. The preponderant public opinion required the legislature to make a choice between the interests of persons selling articles under trade-marks, brands and names, as against the unrestricted freedom of vendees of such merchandise to resell the same free of all restrictions. Where a state legislature is required, in order to promote the general wel-

* *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549, 567, 568 (1911); opinion of Mr. Justice Stone in *Tyson* v. *Banton*, 273 U. S. 418, 452, 453; *Nebbia* v. *New York*, 291 U. S. 502, 525 (1934); and opinion of the Chief Justice in *Morehead* v. *People of the State of New York*, 298 U. S. ....., 56 S. Ct. 918, 930 (1936).

fare, to make a choice between conflicting property rights, resulting in the preferment of one right over another, the fact that certain individuals derive immediate benefits from such preferment, does not render the exercise of the police power invalid. *Miller* v. *Schoene*, 276 U. S. 272 (1928); *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110 (1911); *Offield* v. *N. Y. N. H. & H. R. R. Co.*, 203 U. S. 372, 377 (1906).

(b) The operation and effect of the Act is not unreasonable, arbitrary or capricious and the Act is reasonably designed to carry out its purpose.

In considering the reasonableness of the method adopted by the legislature to curb the economic evil of price-cutting, it should be observed that the only remedy provided for by the statute is judicial relief for the protection of any person actually damaged thereby, and that the defendant is given the opportunity to be heard and to urge any legal or equitable defense * which it may have. Under such circumstances, it "amounts to a contradiction of terms to say that in submitting the matter to the Courts, there is a denial of due process." *Arizona Employers' Liability Cases*, 250 U. S. 400, 426 (1919). In addition, the relief accorded by courts in the absence of statutes in situations analogous to those provided for by the Act demonstrate that it is not unreasonable, arbitrary or capricious in its operation and effect, and that it is reasonably designed to accomplish its purpose. *Montana Company* v. *St. Louis Mining & Milling Co.*, 152 U. S. 160, 169 (1894). The situations to

* Section 43 of the Civil Practice Act of Illinois provides that a defendant may in all actions plead equitable as well as legal defenses. (Ill. State Bar Stat. 1935, Ch. 110, ¶ 171, Laws of Illinois 1933, pp. 784, 795.)

which we refer include the cases recognizing the validity of equitable servitudes on property, already discussed at p. 20, *et seq.* of this brief, the cases granting equitable relief against interference with contract relations, and cases granting equitable relief against unfair competition.

The courts have held, even in the absence of statute, that equity will restrain a third person from wilfully and knowingly interfering with or participating in breaches of contracts to the irreparable injury of a party thereto. In *Angle* v. *Chicago, St. Paul etc. Ry. Co.*, 151 U. S. 1 (1894), this court held that an actionable wrong is committed by one who "maliciously interferes in a contract between two parties and induces one of them to break that contract to the injury of the other", and granted equitable relief. In *Bitterman* v. *L. & N. R. R. Co.*, 207 U. S. 205 (1907), this court held that it was not necessary that actual malice in the sense of personal ill will should appear but that a wanton disregard of contract rights constituted legal malice within the doctrine of the *Angle* case, and restrained defendant from dealing in nontransferable railroad tickets acquired by defendant with knowledge of such nontransferability. In *Wells & Richardson Co.* v. *Abraham*, 146 Fed. 190 (C. C. N. Y. 1906), affirmed 149 Fed. 408 (C. C. A. 2d, 1906), although the court stated that it considered resale price maintenance contracts generally not binding upon third persons, it granted equitable relief where the third person was a party to the breach of such contracts with a wholesale distributor. See also *Dr. Miles Medical Co.* v. *Jaynes Drug Co.*, 149 Fed. 838 (C. C. Mass. 1906). Authorities on the general question are discussed in Carpenter, *Interference with Contract Relations*, 41 Harvard Law Review 728

(1928); Sayre, *Inducing Breach of Contract*, 36 Harvard Law Review 663 (1923); and in 84 A. L. R. 43, 52 (1933).*

The courts have also held, even in the absence of statute, that where defendant by deception wilfully and knowingly interferes with contracts to the irreparable injury of a party thereto, such conduct will be restrained by a court of equity. *Garst* v. *Charles*, 187 Mass. 144, 72 N. E. 839 (1905); *National Phonograph Company, Limited* v. *Edison-Bell Consolidated Phonograph Company, Limited* (1908), 1 L. R. Ch. Div. 335. In view of the foregoing precedents in analagous situations, we submit that there is no force to defendant's contention that the statutory application of the principles therein enunciated is unreasonable, arbitrary or capricious, or irrelevant to the legislative purpose.

This Court has observed that the doctrine of unfair competition is a creature of a court of equity and that the right to equitable relief is not confined to cases of palming off goods as those of another. *International News Service* v. *Associated Press*, 248 U. S. 215, 241 (1918), followed in *Fisher* v. *Star Co.*, 231 N. Y. 414, 132 N. E. 133, 137 (1921). In Nims, *Unfair Competition and Trade Marks*, (3d Ed.

* Although we have merely referred to this theory of relief as an analogy supporting the reasonableness of the Act, we respectfully submit that it may be considered a basis for the affirmance by the Supreme Court of Illinois of the trial court's decree. The court stated in 363 Ill. 610, 611, 612 (R. 106, 108), that "defendant was a party to breaches of other Fair Trade Contracts between plaintiff and certain distributors * * * We are of the opinion that the Fair Trade Act is valid and that under the facts in this record plaintiff was entitled to equitable relief by injunction."

1929) p. 36, the author traces the development of unfair competition and concludes (p. 37) that "the nature of the act of passing off has not changed, but our ideas of what is fair, have changed. To such changes the equity judge must necessarily be sensitive." As has been demonstrated by the facts in this case, price cutting is seriously injurious to, if not completely destructive of the good-will of the owner of the trademark, brand or name or of the distributor of the products sold thereunder. The protection of such good-will is the primary reason for granting relief in unfair competition cases. Nims, *Unfair Competition and Trade Marks,* 3rd Ed. pp. 50-52. It is thus apparent, that relief against price cutting is peculiarly within the jurisdiction of a court of equity in unfair competition cases. It has therefore been suggested that equitable relief against price-cutting is but a natural development of the law of unfair competition. See Rogers, *Predatory Price Cutting as Unfair Trade,* 27 Harvard Law Review, 139, 154 (1913), and also Seligman and Love, *Price Cutting and Price Maintenance,* p. 276 (1932). The availability of equitable relief for the protection of names and good will inherent in such names is shown even in cases where no competition of any kind was involved. *Wall* v. *Rolls-Royce of America, Inc.,* 4 Fed. (2d) 333 (C. C. A. 3rd, 1925); *Vogue Company* v. *Thompson-Hudson Company,* 300 Fed. 509 (C. C. A. 6th, 1924); *Yale Electric Corp.* v. *Robertson,* 26 Fed. (2d) 972 (C. C. A. 2d, 1928); *L. E. Waterman Co.* v. *Gordon,* 72 Fed. (2d) 272, (C. C. A. 2d, 1934). In view of the foregoing authorities, it can not be said that the Fair Trade Act as a logical development of the doctrine of unfair competition is

so unreasonable as to constitute a violation of constitutional rights. The fact that the doctrine is a creature of a court of equity is an adequate assurance that it will not be administered arbitrarily.

Defendant's further contention on page 65 of its brief that the Act is unconstitutional because it is indefinite is without merit. This Court has stated, in disposing of such an objection under circumstances similar to those in the case at bar that "The objection of plaintiffs in error to the vagueness of the statute is without weight. The state court has held it to be applicable and that is enough when, by the statute, no penalty can be incurred or disadvantage suffered in advance of the judicial ascertainment of its applicability." *Miller* v. *Schoene*, 276 U. S. 272, 281 (1928); Cf. *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 69 (1911).

III.

The Act does not deny the defendant the equal protection of the laws in violation of the Fourteenth Amendment.

Defendant argues that the Act, in protecting owners of articles which are sold under trade-marks, names or brands, as distinguished from owners of articles sold without reference to any trademark, name or brand, establishes an arbitrary, discriminatory, unreasonable and unjust classification. Defendant, however, cannot assail the validity of the Fair Trade Act for this reason because it does not assert any right in this case to avail itself of the provisions of the Act in

connection with the distribution of articles not bearing the required identification. *Arkadelphia Milling Co.* v. *St. Louis, Southwestern Ry. Co.*, 249 U. S. 134, 149 (1919); *Darnell* v. *Indiana*, 226 U. S. 390 (1912). Moreover, there is in fact no discrimination under the Act. It applies to commodities bearing the "The trade-mark, brand or name of the producer or owner of such commodity", and it is readily apparent that the benefits of the Act are open to anyone who chooses to adopt such trade-marks, brands or names and utilize the same and bring himself within the scope of the Act. No one is deprived of the benefits of the Act merely because he may not be the owner of a trade-mark in the technical sense. In view of this general availability of the Act, defendant's contention is unfounded. *Perkins* v. *Heert*, 158 N. Y. 306; 53 N. E. 18 (1899); *Barrett* v. *Millikan*, 156 Ind. 510; 60 N. E. 310, 312 (1901).

Defendant's argument on this point further ignores the fact that price-cutting is harmful to the goodwill of the owner or distributor of articles sold under trade-marks, names or brands, *Fisher Flouring Mills Co.* v. *Swanson*, 76 Wash. 649, 137 Pac. 144, 151 (1913); *Robert H. Ingersoll & Bro.* v. *Hahne & Co.*, 88 N. J. Eq. 222, 101 Atl. 1030 (1917), 89 N. J. Eq. 332, 108 Atl. 128 (1918); See also, Rogers, *Predatory Price Cutting as Unfair Trade*, 27 Harvard Law Review, 139, 151 (1913). This goodwill naturally cannot exist in the case of articles not bearing any such identification or indicia of origin. This distinction clearly supports the reasonableness of the classification attacked by defendant in view of the many decisions of this Court recognizing the wide discretion given state legislatures in this regard. *Metropolitan Casualty Insurance Co. of N. Y.* v.

Brownell, 294 U. S. 580, 583 (1935); *Bayside Fish Flour Co.* v. *Gentry,* 297 U. S. 422, 429 (1936); *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 209 (1934); *Lindsley* v. *National Carbonic Gas Co.,* 220 U. S. 61, 73 (1911). See also, *Borden's Farm Products Co.* v. *Ten Eyck,* 297 U. S. 251 (1936), upholding the validity of a differential in the price of milk established in favor of dealers not having a well advertised trade name.

Conclusion.

We respectfully submit that defendant was not deprived of its liberty or property without due process of law and was not denied the equal protection of the laws in violation of the Fourteenth Amendment, and that the judgment appealed from should be affirmed.

Respectfully submitted,

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APPENDIX.

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